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Risky Killing and the Ethics of War*

Seth Lazar

Killing civilians is worse than killing soldiers. Although this principle is widely affirmed, recent military practice and contemporary just war theory have undermined it. This article argues that killing an innocent person is worse the likelier it was, when you acted, that he would be innocent: riskier killings are worse than less risky killings. In war, killing innocent civilians is almost always riskier than killing innocent soldiers. So killing innocent civilians is worse than killing innocent soldiers. Since almost all civilians are innocent in war, and since killing innocent civilians is worse than killing liable soldiers, killing civilians is worse than killing soldiers.

I. INTRODUCTION

Killing civilians is worse than killing soldiers. If any moral principle commands near universal assent, this one does. It is written into every major historical and religious tradition that has addressed armed conflict. It is uncompromisingly inscribed in international law. It underpins and informs public discussion of conflict—we always ask first *how many civilians*

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died? And it guides political practice, at least in liberal democracies, both in how we fight our wars and in which wars we fight.¹

Everyone agrees that killing civilians is worse than killing soldiers. Everyone, that is, except contemporary just war theorists. Back in the 1970s, Michael Walzer defended this principle with a simple argument.² Civilians and soldiers all start with rights to life. But soldiers pose lethal threats, so they lose that right. Killing civilians violates their rights; killing soldiers does not: simple, even elegant. But in recent years philosophers have exposed the flawed premises behind this welcome conclusion. Walzer had his facts wrong: many soldiers contribute no more to threats than do many civilians. Worse, his account of how one loses the right to life is mistaken.³ Posing a threat is neither necessary nor sufficient for one to become liable to be killed.

However, as compelling as the critique of Walzer has been, his critics have proved too much. Their theories cannot explain why killing civilians is worse than killing soldiers. According to their revisionist view, one loses the right to life by being responsible for contributing to unjustified threats.⁴ Yet first, many soldiers and civilians are equally responsible for

1. Hinduism: Wendy Doniger, *The Laws of Manu* (London: Penguin, 1991), 137–38, verses 91–93; Islam: Muhammad Munir, “The Protection of Civilians in War: Non-combatant Immunity in Islamic Law War,” *Hamdard Islamicus* 34 (2011), online at http://works.bepress.com/muhammad_munir/13; Judaism: Daniel Reisel, “The Halachic Duty to Avoid Civilian Casualties,” *The Jewish Chronicle Online*, at <http://www.thejc.com/judaism/judaism-features/the-halachic-duty-avoid-civilian-casualties>; Christianity and the broader Western tradition: Gregory M. Reichberg, Henrik Syse, and Endre Begby, *The Ethics of War: Classic and Contemporary Readings* (Oxford: Blackwell, 2006), 131 (Raymond of Peñafor), 222 (Christine de Pisan), 248 (Cajetan), 324 (Vitoria), 362 (Suarez), 432 (Grotius), 474 (Christan von Wolff). For a general history, see Colm Mckeogh, *Innocent Civilians: The Morality of Killing in War* (Basingstoke: Palgrave, 2002). For the laws of war, see especially Articles 48, 51, and 57 of the first additional protocol to the Geneva Conventions. On public discussion of civilian casualties, see, e.g., Anthony Reuben, “Caution Needed with Gaza Casualty Figures,” *BBC News Online* (2014), at <http://www.bbc.com/news/world-middle-east-28688179>; the Iraq Body Count, which collects statistics primarily about civilian deaths in Iraq since 2003 www.iraqbodycount.org; and the International Committee of the Red Cross, www.icrc.org/en/what-we-do/protecting-civilians. And on contemporary military practice, see Colin H. Kahl, “In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and U.S. Conduct in Iraq,” *International Security* 32 (2007): 7–46. Recent (Libya) and ongoing (Syria/Northern Iraq) interventions in the Middle East have been provoked by anticivilian violence.

2. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic, 1977).

3. See, e.g., Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009); Richard Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995); Tony Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008); David Rodin, *War and Self-Defense* (Oxford: Clarendon, 2002).

4. See, e.g., McMahan, “Innocence, Self-Defense and Killing in War,” *Journal of Political Philosophy* 2 (1994): 193–221; McMahan, “The Ethics of Killing in War,” *Ethics* 114 (2004):

such contributions; indeed, many from both groups are not responsible at all.⁵ Second, this principle does not distinguish between killing civilians and soldiers on the just side (if there is one).⁶ This is a big departure from the common sense consensus. Consider the conflict in Syria and Northern Iraq, raging as I write. When ISIS fighters kill Peshmerga soldiers, they surely commit grievous wrongs. But it's *even worse* when they kill civilians, like the Yazidi whose suffering triggered international intervention. Even if *all* the killing one does in war is wrong, still, killing civilians is worse than killing soldiers.

In this article, I want to vindicate common sense. The first step is to be more precise. I will defend this principle:

Moral Distinction: In war, with rare exceptions, killing enemy non-combatants is *pro tanto* more seriously fact-relative wrongful than killing enemy combatants.

Some clarifications: first, 'civilians' and 'soldiers' are more euphonious, but the fundamental categories here are noncombatants and combatants. I will use these pairs of terms interchangeably, but I endorse the definition of noncombatant and combatant status given in international law. Combatants are members of the armed forces of a group at war and nonmembers who directly participate in hostilities. Noncombatants are not combatants.

Second, I named the principle for the Moral Distinction between harms inflicted on civilians and soldiers in war. It is inspired by, but differs from, the principle of distinction in the laws of armed conflict, which prohibits targeting civilians.⁷ Moral Distinction makes a comparative claim rather than specifying a prohibition, and it covers all kinds of killing, whether intentional, incidental, or accidental. In practice, the protection of civilians in war depends on the principle of distinction, as well as on

693–732; Cecile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012); Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014).

5. McMahan, "Innocence": 210; Noam J. Zohar, "Innocence and Complex Threats: Upholding the War Ethic and the Condemnation of Terrorism," *Ethics* 114 (2004): 734–51, 742; reference omitted.

6. McMahan, "Killing in War": 718; McMahan, *Killing in War*, 16; Fabre, *Cosmopolitan War*, 72–75.

7. This is the International Committee of the Red Cross's statement of the Principle of Distinction: "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."

Some legal scholars divide this into two components: to distinguish, and to attack only combatants. See Adil Ahmad Haque, "Protecting and Respecting Civilians: Correcting the Substantive and Structural Defects of the Rome Statute," *New Criminal Law Review* 14 (2011): 519–75.

other norms of international law, such as proportionality and precautions in attack (as in articles 51 and 57 of the first additional protocol to the Geneva conventions). But each of these norms presupposes Moral Distinction (or something close to it), since if killing civilians were no worse than killing soldiers, then we should either extend these protections to soldiers or strip them from civilians. The first outlaws war altogether; the second leaves it practically unconstrained. Of course, defending these legal principles requires more besides Moral Distinction. But without a principle like Moral Distinction, that project is hopeless.

Third, I introduce each term in the relation “*X* is *pro tanto* more seriously fact-relative wrongful than *Y*” in Section II. In brief, it means that holding constant the numbers affected, the degree of harm, and the aim sought, the objective moral reasons against *X* are weightier than those against *Y*. When I write “*X* is worse than *Y*,” this is what I mean. Note that this is consistent with *Y* not being wrongful at all.

Fourth, Moral Distinction distinguishes between different acts of killing by the same agent. It does not offer a general weighting of the lives of combatants and noncombatants but a specific account of the comparative wrongfulness of killing these two types of person. Since we do not (except accidentally) kill people on our side, it therefore differentiates between killing *enemy* noncombatants and killing *enemy* combatants.

The best defense of Moral Distinction will invoke multiple overlapping foundations. Although each will have exceptions, taken together they will robustly protect civilians in war. In this article, I introduce one strand of that pluralist defense, which complements Walzer’s and the revisionists’ arguments, but remedies their defects. In particular, it is compatible with many civilians and soldiers being equally (non)responsible for unjustified threats; and it applies to both the just and the unjust sides. I first argue that killing an innocent person is worse, the more likely it was that he would be innocent: riskier killings are, other things equal, worse than less risky killings. I then argue that in war, with rare exceptions, killing civilians is riskier than killing soldiers. So I conclude (with a few more steps along the way, and again with rare exceptions) that killing civilians is worse than killing soldiers.

However, perhaps this whole approach is misguided: maybe instead of seeking the roots of Moral Distinction, we should know it by its fruits.⁸ Perhaps our commitment to this principle reduces the suffering that war inevitably involves, and no further justification is needed. This might be right; it is certainly politic: we can more easily inspire adherence to

8. George I. Mavrodes, “Conventions and the Morality of War,” *Philosophy and Public Affairs* 4 (1975): 117–31; Janina Dill and Henry Shue, “Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption,” *Ethics and International Affairs* 26 (2012): 311–33.

a norm if everyone thinks it in their interests. But we should hesitate before relying on instrumental reasons to protect civilians in war. They are least effective when civilians are most vulnerable—when belligerents believe that harming civilians *does* minimize suffering, because it is necessary to achieve their aims.⁹ This is when civilians need Moral Distinction most, but instrumental arguments protect them least.

Even if the instrumental argument succeeded, it would vindicate Moral Distinction for the wrong reasons. The outrage we feel when villages are burned, hospitals gutted, and schools bombed is not pragmatically motivated. For many of us, our commitment to the protection of civilians in war is more visceral than instrumental arguments alone can capture. We should mobilize *all* the resources of moral philosophy in its defense.

II. PRELIMINARIES

Like both Walzer and his critics, I think everything starts with rights. Persons have a right to life, which protects their interest in living.¹⁰ Sometimes that protection can be weakened or lost. In particular, when killing a person is a necessary and proportionate means to avert an unjustified threat, for which she is responsible enough, then she is *liable* to be killed, and killing her does not infringe her right to life: killing her does not wrong her at all. Killing her is proportionate if the threat averted is serious enough to make her liable to be killed to avert it. It is necessary if no other less harmful means could avert the threat.¹¹ When someone is not liable to be killed, I will call her *innocent*.

When an act is wrong *tout court* it is morally impermissible. When it is *pro tanto* wrongful, a moral reason tells against it; it would be wrong *tout court* were no other moral reasons at stake. Normally acts are wrongful because they wrong someone. An act can be overall permissible despite being *pro tanto* wrongful, if weighty reasons in favor override the reasons against.

9. For chilling historical research to support this point, see Benjamin A. Valentino, *Final Solutions: Mass Killing and Genocide in the Twentieth Century* (Ithaca, NY: Cornell University Press, 2004). For more recent examples, see the public justifications offered for the apparently disproportionate harms inflicted on Gazan civilians in the 2014 Gaza War, which appealed to their military necessity: Herb Keinon, "PM: Terrorists Watching Whether World Gives Immunity for Attacks from Schools, Homes," *Jerusalem Post*, August 6, 2014 (2014), at <http://www.jpost.com/Operation-Protective-Edge/WATCH-LIVE-Netanyahu-addresses-foreign-press-in-aftermath-of-Gaza-operation-370255>; Yishai Schwartz, "Israel's Deadly Invasion of Gaza Is Morally Justified," *New Republic*, July 21, 2014 (2014), at <http://www.newrepublic.com/article/118788/israels-war-gaza-morally-justified>.

10. What makes an entity qualify for personhood is a vexed issue, which I do not address here.

11. This is a simplification; for more detail, see Seth Lazar, "Necessity in Self-Defense and War," *Philosophy and Public Affairs* 40 (2012): 3–44.

Killing the innocent is *pro tanto* wrongful. Even when it is overall permissible, the victim has a justified complaint against the agent who infringed her rights. Killings can be, *pro tanto*, more or less gravely wrongful: consider the difference between murder and manslaughter, for example. Killing is generally *pro tanto* more wrongful than other kinds of harm. For *pro tanto* seriously wrongful acts to be permissible, the overriding reasons must be proportionately weighty. Since I focus throughout this article on *pro tanto* wrongfulness, I will omit '*pro tanto*' except for emphasis.

An act can be wrongful in at least three senses.¹² An act is *fact-relative wrongful* if it is wrongful in light of all the facts.¹³ It is *evidence-relative wrongful* if it is wrongful in light of the agent's evidence. And it is *belief-relative wrongful* if it is wrongful in light of the agent's beliefs. I focus throughout on fact-relative wrongfulness, so I omit 'fact-relative' except for emphasis.

Since my topic is risk, we also need a working understanding of probability. There are three prominent conceptions. Objective probabilities—chances—are mind- and perspective-independent features of the world, like the 50:50 chance that a radium atom will decay within 1600 years. Evidential probability is the probability justified by a body of evidence. On the most plausible accounts, evidence gives an intuitive, though imprecise, degree of support to the hypothesis in question.¹⁴ Subjective probability is the probability assigned by a subject.¹⁵ Evidential and subjective probabilities are both species of epistemic probability, indexed to a particular epistemic position.

With these pieces in place, I can state my normative thesis more precisely: when *A* kills *B*, and *B* is not liable to be killed, other things equal *A*'s act is *pro tanto* more seriously fact-relative wrongful the higher the epistemic probability,¹⁶ when she acted, that *B* was not liable to be killed. *Riskier killings are worse than less risky killings*.¹⁷ Call this thesis *Risky Killing*.

12. This terminology was introduced by Derek Parfit, *On What Matters* (Oxford: Oxford University Press, 2011), 150–74. It has been defended as superior to other terminologies by Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 217–40. The same tripartite diversion works for permissibility simpliciter.

13. Parfit writes that an act is "*wrong* in the *fact-relative* sense just when this act would be wrong in the ordinary sense if we knew all of the morally relevant facts" (*On What Matters*, 150). However, what matters is not whether we know the facts, but what the facts are.

14. Timothy Williamson, *Knowledge and Its Limits* (Oxford: Oxford University Press, 2000), 223; Roger White, "Evidential Symmetry and Mushy Credence," *Oxford Studies in Epistemology* (Oxford: Oxford University Press, 2009), 161–86.

15. See, e.g., F. P. Ramsey, "Truth and Probability," in *Philosophy of Probability: Contemporary Readings*, ed. Antony Eagle (New York: Routledge, 2010), 52–94; Bruno De Finetti, *Theory of Probability: A Critical Introductory Treatment* (Chichester: Wiley, 1990).

16. This is intentionally ambiguous between the two kinds of epistemic probability—more on this in Sec. III.

17. Recall that "X is worse than Y," for my purposes, simply means "X is *pro tanto* more seriously fact-relative wrongful than Y."

III. RISKY KILLING

A. Overview

To build a case for Risky Killing, it will help to have some examples in mind. Consider:

Sniper-Low: Aggie is a sniper, hunting Charlie, a terrorist whose death will save lives. She has a man in her sights. Her evidential and subjective probability that this is *not* Charlie are both 0.1. She fires. She kills Bruce, who was in fact innocent.

Sniper-High: The same as Sniper-Low, except that Aggie's evidential and subjective probability that this is *not* Charlie are high—say, 0.9.¹⁸

Aggie's act is worse in Sniper-High than in Sniper-Low, because it was so much likelier that her target was innocent.¹⁹ Many will share this intuition. Aggie took a bigger risk with Bruce's life in Sniper-High than in Sniper-Low, so of course she wronged him more seriously if she kills him! Indeed, some will find this basic intuition more convincing than any argument in its favor. However, in this section I offer three arguments (III.B–III.D) to persuade those who are not already on board. I then address what follows when Aggie's evidence and her beliefs diverge (III.E), before stating Risky Killing in its canonical form (III.F).

B. Disrespect

An agent's mental states when violating a right can affect the seriousness of that right-violation.²⁰ Intended rights-violations are worse than unintended ones; killing an innocent person for one's gratification is worse than killing him to save others' lives; killing him opportunistically is worse than killing him to eliminate a threat that he himself poses.²¹ In the same spirit, I think violating someone's right to life when one believes one's act will probably violate that right is worse than doing so when that outcome is less likely.

18. These cases raise some interesting issues that I lack space to address here. In particular, I focus on fact- rather than evidence-relative wrongfulness, and discuss only the probability of innocence, rather than also considering the probability that killing her target is unnecessary or disproportionate.

19. For simplicity, assume that Aggie is sure that if this is not Charlie, then it is an innocent person.

20. This claim is rejected by, among others, Judith Jarvis Thomson, "Self-Defense," *Philosophy and Public Affairs* 20 (1991): 283–310; Frances M. Kamm, "Failures of Just War Theory: Terror, Harm, and Justice," *Ethics* 114 (2004): 650–92. For excellent defenses, see Russell Christopher, "Self-Defense and Defense of Others," *Philosophy and Public Affairs* 27 (1998): 123–41; Tadros, *The Ends of Harm*, 139–66.

21. Warren S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy and Public Affairs* 18 (1989): 334–51; Tadros, *The Ends of Harm*.

To see why, consider a paradigm wrongful killing: Aggie is certain that Bruce is innocent but intentionally cuts his throat to satisfy a whim. By killing Bruce like this, she shows herself ready to violate his most fundamental right for a trivial end. This shows total disregard for his standing as her moral equal, someone with moral status, whom she cannot use to fulfil her whims. Now vary the likelihood that Bruce is innocent—suppose there is some probability that killing him will avert a lethal threat to an innocent victim. The less likely this possibility, the more likely it is that Bruce is innocent. If Aggie nonetheless proceeds, then she proves herself proportionately readier to sacrifice him for her own trivial goals, and she more gravely insults his moral standing.

One might object that Aggie does not disrespect Bruce in the Sniper cases since, unlike in the paradigm case, her aim is noble: to save Charlie's victims.²² Suppose we stipulate that Charlie's potential victims are numerous enough that proceeding, at least in Sniper-High, is evidence-relative permissible. How can Aggie disrespect Bruce if she does what she ought to do given her evidence?

Even if the stakes are high, Aggie disrespects her victim more gravely in Sniper-High than in Sniper-Low, by proving herself readier to sacrifice an innocent person for the greater good. Even if one's act is all things considered permissible, if it imposes on someone else a cost that she is not required to bear, one disrespects her by treating her as a resource to use or sacrifice for others' sakes.²³ This explains why justifying such impositions is hard, and why marginal trade-offs (harming one person for a slightly larger benefit to another) are wrong. The higher the probability that her target is innocent, the more seriously Aggie instrumentalizes him, showing disregard for his moral status as an end in himself. This basic principle applies whether her ends are noble, trivial, or pernicious.

C. *Necessity*

The second argument focuses on the choice between harming those who are more and less likely to be innocent. Consider,

Sniper-Choice: The same as Sniper-Low, except that Aggie can choose between two targets, each of whom she believes could be Charlie. The probability that the first (call him Bruce-Low) is not Charlie is

22. Thanks to a reviewer for raising this objection.

23. Tadros argues that it is permissible to sacrifice an innocent person's life for the greater good, when that person would be required to sacrifice his own life for that end (*The Ends of Harm*, 129). I favor a different view: we have an agent-centered prerogative not to sacrifice our own lives for others' sakes. It can therefore be permissible to kill someone to achieve an objective that she would not, because of her agent-centered prerogative, be required to sacrifice her own life to realize.

0.1; the probability that the second (Bruce-High) is not Charlie is 0.9. Both Bruce-Low and Bruce-High are in fact innocent.

The necessity constraint on defensive force prohibits inflicting unnecessary harm, even on someone who might otherwise be liable.²⁴ It depends on the truism that all harm is bad (except perhaps when deserved) and so should be minimized. This reasoning extends beyond actual harms, to risks of harm: if a defensive act involves an unnecessary risk of harm, then that too counts against it, however the risk turns out. Moreover, this extends even more forcefully to risks of *wrongful* harm, since wrongful harms are worse than otherwise similar non-wrongful harms. In other words: if we should minimize harm, then we should minimize risks of harm; and if we should minimize risks of harm, we should minimize risks of wrongful harm.

Whether Aggie shoots Bruce-High or Bruce-Low, she imposes the same risk of harm (she is a crack shot and certain to hit her target). But if she shoots Bruce-High, then the probability that he is innocent is higher, so she imposes a higher risk of wrongful harm than if she shoots Bruce-Low. Killing Bruce-High therefore imposes an unnecessary risk of wrongful harm on him. Aggie could have had the same opportunity to kill Charlie, at a lower risk, by killing Bruce-Low. Killing Bruce-High is therefore worse than killing Bruce-Low, because it breaches the necessity constraint on defensive force.

D. Endangerment

Rights-violating killings are worse violations of the right to life when they are riskier. I also think riskier killings more seriously breach a further right, not to be exposed to unchosen risks of wrongful harm; for short, the right not to be endangered. The argument has four stages.

Stage 1: Endangerment is wrongful even if the risks imposed do not lead to harm.²⁵ Speeding through a residential neighborhood or conducting brain surgery while drunk are wrong, even if one avoids a collision or removes the tumor. And riskier behavior is, other things equal, worse than less risky. If driving through a suburb at 60 mph is wrong, doing so at 150 mph is still worse; if operating while tipsy is wrong, doing so while smashed is still more so. A few skeptics aside, most philosophers—and most legal jurisdictions—concur that we have a right not to be exposed to unchosen risks of wrongful harm.²⁶

24. See, e.g., Lazar, "Necessity in Self-Defense and War."

25. See Madeleine Hayenhjelm and Jonathan Wolff, "The Moral Problem of Risk Impositions: A Survey," *European Journal of Philosophy* 20 (2012): 26–51.

26. Skeptics: Judith Jarvis Thomson, *Rights, Restitution, and Risk: Essays in Moral Theory* (Cambridge, MA: Harvard University Press, 1986); Kenneth Simons, "When Is Negligent

Stage 2: Divide an instance of endangerment into time stages. At T_1 , Driver recklessly enters a neighborhood at 100 mph, knowing there are people around, including two pedestrians, Lucky and Unlucky; at T_2 , Driver's car then hits Unlucky, killing her. Lucky escapes unharmed. Lucky's right against endangerment was violated at T_1 . Lucky and Unlucky were in the same position at T_1 . So if Driver violated Lucky's right not to be endangered, then he also violated Unlucky's. At T_2 Unlucky suffers a second right-violation, this time of her right to life.

In general, if one person violates another's right, then whatever happens afterward, *she has still violated that right*. Later events might justify that violation or restore the *status quo ante* through compensation. But nothing after a right-violation can make it as though it never happened. Of course, violating someone's right to life is worse than violating his right not to be endangered. When the two occur together, we naturally focus on the more serious right-violation. This is true, for example, with murder. In no case, however, does a second right-violation erase an earlier one.

One might worry about how to individuate wrongful impositions of risk. Suppose Driver is doing laps of a block. Does he violate the pedestrians' rights against endangerment each time he passes them?²⁷ I think their rights protect the pedestrians against the Driver acting in a certain way. Whether he violates their right each lap depends on how we individuate the relevant acts. I cannot properly address such a big topic here.²⁸ I simply claim that, however we individuate his acts, Driver *does the same thing* to Lucky and Unlucky at T_1 . That he then *does something else*, violating another of Unlucky's rights, does not remove a complaint that she would have had, had he not violated that second right.

Stage 3: In stages 1 and 2 the agent imposes a risk of harm on someone who we know not to be liable. My primary interest, however, is in risks of suffering *wrongful* harm, when the harm is certain, but liability is in doubt. I must show that intuitions about one carry over to the other.

They do. What matters for this argument and indeed those in Sections III.B and III.C, is that the agent has imposed a *risk of wrongful harm*. By showing herself readier to impose that risk in Sniper-High than in Sniper-Low, Aggie shows greater disrespect for Bruce. By choosing to

Inadvertence Culpable?" *Criminal Law and Philosophy* 5 (2011): 97–114. Supporters: John Oberdiek, "The Moral Significance of Risking," *Legal Theory* 18 (2012): 339–56; Stephen Perry, "Risk, Harm, Interests, and Rights," in *Risk: Philosophical Perspectives*, ed. Tim Lewens (New York: Routledge, 2007), 190–210; Michael J. Zimmerman, "Risk, Rights, and Restitution," *Philosophical Studies* 128 (2006): 285–311.

27. Thanks to a reviewer for raising this objection.

28. Does each punch in an ongoing attack violate one's rights? I am inclined to think that it does, so we should not be surprised to see something similar with risk.

fire at Bruce-High rather than Bruce-Low in Sniper-Choice, she runs an unnecessary risk of inflicting wrongful harm on her victim. And for endangerment, the same principles apply.

Consider, for example, Jean Charles de Menezes, the Brazilian man killed by British police in the mistaken belief that he was a terrorist. Killing this man was egregiously wrongful, in part because it was so likely when the officers acted that he was innocent. They took a terrible risk with an innocent man's rights. But they shot him point-blank in the head: their act was sure to be lethal. They wrongfully endangered de Menezes because they attacked him without adequate grounds to believe him liable.²⁹

Stage 4: The first three stages should persuade anyone who already thinks we have a right against endangerment that it is relevant to Aggie's wrongdoing in Sniper-High. For any remaining skeptics, sketching a theory of that right may help.³⁰

The right against endangerment has roots in our interest in security, which is both instrumentally and noninstrumentally valuable. Security is the avoidance of unchosen risks of wrongful harm. Enjoying security is instrumental to enjoying other goods.³¹ If I am secure, then I escape harms that might otherwise have befallen me. Being insecure also generates anxiety and distress. Besides upsetting us in the present, insecurity also makes it more difficult to plan, by closing off options because of the risks involved.³²

For hedonistic and preference-satisfaction theories of well-being, these instrumental goods exhaust security's value. For objectivist theories, there is more to say.

First, I am better off if my freedom from wrongful harm does not avoidably depend on luck. Luck is antithetical to control: if my avoiding some outcome depends on luck, then I cannot control whether that outcome will come about. Control, in turn, is one constituent of autonomy—being autonomous implies having some control over how one's life goes.³³

29. There were also many prior instances of gross negligence in this case: see "Seven Mistakes that Cost De Menezes His Life," *Independent*, December 13, 2008, at <http://www.independent.co.uk/news/uk/crime/seven-mistakes-that-cost-de-menezes-his-life-1064466.html>.

30. I think these are attractive alternatives: Perry, "Risk, Harm, Interests, and Rights"; Oberdiek, "The Moral Significance of Risking." For a view with some parallels to my own, see Jonathan Wolff and Avner De-Shalit, *Disadvantage* (Oxford: Oxford University Press, 2007), 63–73.

31. For example, see Hayenhjelm and Wolff, "The Moral Problem of Risk Impositions."

32. Oberdiek, "The Moral Significance of Risking"; Stephen John, "Security, Knowledge and Well-Being," *Journal of Moral Philosophy* 8 (2011): 68–91.

33. This is especially clear on Philip Pettit's theory of freedom as nondomination but is also a plausible development of Raz's account of autonomy. See Pettit, "Freedom and

Being autonomous is noninstrumentally valuable; most of us aspire to this ideal for its own sake, not because of other goods it brings us. Since having control is a way of being autonomous, having control should be noninstrumentally valuable too. Moreover, control over whether one suffers wrongful harm is especially important, given how central our interest in not being wrongfully harmed is. Suppose neither of two people ever suffers wrongful harm, though for one but not the other this was a matter of mere luck. The one who had control was better off than the lucky one, just in virtue of having that control.

Obviously though, we cannot avoid luck in all aspects of our lives. But being secure reduces exposure only to one kind of luck: *unchosen risks of wrongful harm*. Even though luck is inescapable, if others avoidably make us dependent on it for our avoidance of wrongful harm, they harm us. Suppose a friend tells you how to walk home at night, in a city that you don't know. He could send you through a safe neighborhood or the same distance through a neighborhood where late night muggings are common. He chooses to send you through the dangerous neighborhood. Even if you get home unharmed, you've still been made worse off by having been avoidably placed at risk of wrongful harm—whether you know about it or not. When you find out what he did, you should definitely have words. Life is fragile enough without people adding to the risks we face. Of course, sometimes we enjoy exposing ourselves to risk, like when we skydive, or catch a minibus in Angola, but this does not undermine our security, because these risks are *chosen*.

Second, when I am secure, others are robustly disposed not to wrongfully harm me, across a range of possible scenarios. Being the object of their concern is noninstrumentally valuable even if those scenarios never arise. For example, in a just society others protect me against destitution and crime. That my fellow citizens care enough about my well-being to provide such protections is good for me, even if I never need to call on them. Similarly, a loving family still further protects me, so that through life's vicissitudes I can rely on their support—I enjoy this good even if my life never turns south.³⁴ When a person is secure, she enjoys a similar status. If others who could harm her if they chose to are robustly

Probability: A Comment on Goodin and Jackson," *Philosophy and Public Affairs* 36 (2008): 206–20; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986).

34. I draw here on arguments made in Seth Lazar, "A Liberal Defence of (Some) Duties to Compatriots," *Journal of Applied Philosophy* 27 (2010): 246–57. My current inflection on them is much informed by conversations with Philip Pettit and Nicholas Southwood, for which I owe thanks. See Pettit, *The Robust Demands of the Good: Ethics with Attachment, Virtue, and Respect* (Oxford: Oxford University Press, 2015); Southwood, "Democracy as a Modally Demanding Value," *Noûs*. Published electronically 15 April 2013. doi:10.1111/nous.12021.

disposed not to inflict risks of such harm on her, they protect her, which is valuable even if situations where she might suffer such harm never arise.

To summarize: being secure is instrumental to realizing important benefits, like freedom from anxiety and the ability to plan; it gives us more control over an important part of our lives, so is a noninstrumentally valuable constituent of autonomy; and it means that we have a non-instrumentally valuable status among those who preserve our security. These are weighty interests, but they ground rights only if they impose reasonable costs on the duty-bearers. If we had to avoid imposing *any* risks on others, then we could not live a recognizable modern life—we could not drive or fly, we would have to quarantine ourselves when sick, and so on.³⁵ Our interest in security does not provide a blanket right against all risks, and sometimes it can be outweighed. However, permissible risks are typically slight, in terms of either the degree or the likelihood of threatened harm. Beyond that fair distribution of risks within a society, the right against endangerment is stringent.

E. Which Probabilities?

Thus far, I have assumed that Aggie's beliefs and her evidence align. However, sometimes her evidence will warrant one view about whether her victim is liable, but her beliefs won't follow. Which determines the seriousness of her wrongdoing?

This question raises some interesting and complex problems. To keep things simple, I will focus only on what I need to defend Moral Distinction (i.e., to show that killing civilians is worse than killing soldiers).³⁶ This means showing that each of my arguments works with Aggie's (sincere, sane) subjective probabilities, but if she believes Bruce less likely to be liable than her evidence warrants, then that gives further grounds for complaint against her when she kills him.

The argument from disrespect works only with subjective probabilities: we cannot infer Aggie's readiness to instrumentalize her victim from facts of which she was unaware, or connections that she did not draw, but only from her (sincere, sane) beliefs. The other two arguments work either with subjective or with evidential probabilities. Insofar as Aggie disrespects Bruce-High by inflicting on him an unnecessary risk of wrong-

35. See, e.g., James Lenman, "Contractualism and Risk Imposition," *Politics, Philosophy and Economics* 7 (2008): 99–122; Sven Ove Hansson, "Ethical Criteria of Risk Acceptance," *Erkenntnis* 59 (2003): 291–309.

36. There are also interesting overlaps between these questions and those to do with the relationship between belief-relative, evidence-relative, and fact-relative permissibility (on which see Parfit, *On What Matters*, 150–74; Tadros, *The Ends of Harm*, 241–61). However, my probabilistic arguments are merely one constituent in a theory of permissibility; the implications of different theories of probability for normative ethics are independent of the implications of the different senses of permissibility.

ful harm, her subjective probabilities are salient. But even if her beliefs and evidence diverge, she still subjects him to an unnecessary risk of wrongful harm since, relative to Aggie's evidence, she could have taken a lesser risk by killing Bruce-Low, without reducing her probability of achieving her goal. As for endangerment, only when others believe they are imposing risks of wrongful harm do they impugn one's status as the object of others' concern. But it is also bad for me when others subject me to risks of wrongful harm on their evidence, even if they do not believe they are imposing such risks.³⁷

Each argument works with the agent's subjective probabilities. But what if she believes Bruce less likely to be liable than her evidence warrants? To answer this, we must first know what counts as her evidence. I think (though my views on this are unconventional) evidence is available to an agent if she would have it if she did the morally required research. The evidential probability is the probability that the agent *ought to assign* to an outcome coming about.³⁸ If the stakes are high—for example, if she is trying to find out if a building is empty before blowing it up—then the agent morally ought to expend greater efforts to gather evidence than if the stakes are low—if she is taking a census, for example, then a knock on the door will suffice.³⁹

To work out the evidential probability of some outcome, we must first work out what research the agent ought to do. If she believes her target is more likely to be innocent than her evidence warrants, then her wrongdoing tracks her actual beliefs: she wrongs him more gravely than she would have, had her beliefs matched the evidence. If she believes her target is less likely to be liable than her evidence warrants, *and she did not do the requisite research or she responded inappropriately to it*, then she has acted *negligently*, and wronged the victim for that reason.

The same arguments support this conclusion as supported Risky Killing, though to avoid repetition and to save space, I will keep them short. First, the agent's negligent act is more disrespectful—her failure to do research appropriate to the stakes reflects inadequate regard for the victim. Her negligence also results in her imposing unnecessary risks, since she could have avoided them by doing proper research. Lastly, by proceeding negligently she exposes her victim to unchosen

37. We can ask similar questions about whose perspective we should assess these probabilities from. For simplicity, again, I focus on the agent. But the necessity and endangerment arguments would still be compelling using the victim's probabilities. Developing this point would take me too far afield, but I return to it in Sec. IV.C.

38. Pace Michael J. Zimmerman, *Living with Uncertainty: The Moral Significance of Ignorance* (Cambridge: Cambridge University Press, 2008). On this subject, see also Holly M. Smith, "The Subjective Moral Duty to Inform Oneself before Acting," *Ethics* 125 (2014): 11–38. This is not a standard understanding of evidential probability.

39. Alexander Guerrero, "Don't Know, Don't Kill: Moral Ignorance, Culpability, and Caution," *Philosophical Studies* 86 (2007): 59–97.

risks of wrongful harm—both the risks that derive from her negligence and the risks relative to the evidential probability that her act will wrongfully harm the victim.

F. *Risky Killing Restated*

I now have the materials I need for my argument for Moral Distinction. The following normative thesis expands on the formulation at the end of Section II:

Risky Killing: If *A* kills two innocent people, *B* and *C*, and *B* was more likely, on *A*'s evidence, to be innocent than *C* was, then (other things equal) killing *B* is objectively worse than killing *C* just in case: either *A* believed *B* more likely to be liable than *C*, or, if she did not, that was because of her negligence.

Before turning to war, let me briefly rebut a general objection to this thesis. Could Bruce's likelihood of innocence depend on Aggie's moral beliefs? If she were an act-consequentialist, for example, who thinks rights and liability do not exist, then she would think Bruce is equally unlikely to be liable in both Sniper-High and Sniper-Low. We might also deny that she *disrespects* Bruce, if she maximizes expected value.⁴⁰

I reject this approach to moral justification. If the agent's moral beliefs affect the fact-relative permissibility of her actions, then she can weaken morality's demands by coming to adopt more permissive moral beliefs. This is an unacceptable kind of subjectivism (I return to this point below).

Moreover, each of my arguments invokes harms that are *in fact* wrongful. The agent's moral beliefs are beside the point. When Aggie kills Bruce in Sniper-High, she is more disrespectful than in Sniper-Low, because she reveals herself readier to sacrifice an innocent person for an end that he is not *in fact* required to share. She further aggravates her violation of Bruce-High's right to life by imposing an unnecessary risk of *in fact* wrongful harm on him, whatever her moral beliefs. And for endangerment: our lives go better if others do not subject us to unchosen risks of suffering *in fact* wrongful harms. Although I obviously care about avoiding harms in general, I do not have a special interest in avoiding risks of harms that someone else mistakenly believes to be wrongful.

IV. WAR

A. *Overview*

I now argue from Risky Killing to Moral Distinction. This is only one strand in a pluralist defense of this principle and does not cover all

40. Thanks to a reviewer for this objection.

cases. But it improves in two ways on previous accounts: it is consistent with many combatants and noncombatants being equally (non)responsible for unjustified threats; and it applies to all sides in a conflict. Moreover, these improvements come cheap: I need show only that civilians are more likely to be innocent than soldiers in war, on which I think most philosophers, and most other people besides, would agree.⁴¹

I argue as follows: first, if one knows about two people only that one is an enemy civilian, the other an enemy soldier, then the former is more likely to be innocent than the latter. Second, combatants in war *should know* whether their victims are civilians or soldiers. If they cannot find this out through reasonable research, they ought not to use lethal force at all (with some exceptions). Third, none of their other evidence overturns that initial assessment. Together with Risky Killing, this shows that killing innocent civilians is worse than killing innocent soldiers; to get to Moral Distinction, we need simply argue that almost all civilians are innocent in war.

I endorse the conventional definitions of combatant and noncombatant status for two reasons. First, because I want to vindicate the commonsense consensus described in the introduction, which has been jeopardized by recent just war theory. Second, this definition fits with my argument: in war, the most informative evidence we have about our victims' innocence is whether they are combatants or noncombatants.

B. Noncombatants Are More Likely to Be Innocent than Combatants

Recall that innocence is the opposite of liability. *N* is liable to be killed if killing her is a necessary and proportionate means to avert an unjustified threat *T*, and if *N* is sufficiently responsible for *T*. *N*'s responsibility for *T* divides into two parts: her causal contribution and her agential involvement.⁴² If *N* is the unmediated, necessary, and sufficient cause of *T*, then she is more causally responsible than if she contributes indirectly, in a manner insufficient and unnecessary for the threat to occur. If *N* malevolently intends her victim's death, knowing it unjustified, her agential involvement is greater than if it was barely foreseeable that her act would bring about *T*.

How much responsibility do we need for liability to be killed? Some think the degree varies with the stakes: if killing can achieve more good, then less responsibility suffices. Others favor a contextually invariant

41. See, e.g., Fabre, *Cosmopolitan War*, 76–78; McMahan, *Killing in War*, 203–35.

42. I do not mean to exclude the possibility of omissive responsibility for a threat. I think we should sometimes describe omissions as causes, while others might account for them in other ways, but it is clear that failures to act can sometimes make one sufficiently responsible for a threat to be liable to suffer harm to avert it.

threshold. This difference does not matter here, since we can hold the stakes constant. For now, we can rule out two implausible extremes. Mere causal contribution, however slight, cannot ground liability; nor is it plausible that only culpable, direct, necessary, and sufficient causes can be liable.

With these conceptual points in place, I can state the argument's first premise:

- (1) If all an attacking combatant *A* knows about two potential enemy victims *N* and *C* is that *N* is a noncombatant and *C* a combatant, then it is more likely that *N* is innocent than that *C* is.

The reasoning behind premise (1) is simple: that *N* is a noncombatant, *C* a combatant, tells *A* that *C* is more likely than *N* to be causally involved in unjustified threats. It tells *A* little, however, about which is more likely to be culpable for her involvement.

To forestall confusion, this premise is consistent with thinking that many noncombatants are at least as causally responsible as many combatants for contributing to unjustified threats in war. Many combatants contribute little if at all; many noncombatants contribute somewhat, and some contribute a great deal. But despite this overlap, civilians in general are less likely to be causally involved in unjustified threats in war than are soldiers. Similarly, many women are taller than many men, but still, men are likely to be taller than women.

Some civilians, such as political leaders, financiers, and influential media figures, contribute significantly to unjustified threats and may count among the exceptions written into Moral Distinction, unless covered by some other argument in its favor. But most civilians contribute only through marginal and attenuated financial, political, and moral support. Moreover, those who do not pay taxes, vote, or otherwise influence public opinion do not contribute in even these ways. And of course children barely contribute at all (though they are somewhat causally involved, e.g., by motivating their parents to fight).

Many soldiers contribute no more than most civilians to unjustified threats. But many others contribute just like civilians—they vote, pay taxes, and so on—and also actively participate in conflict. After all, *somebody* does the killing. Many others contribute to the collective effort that results in death and destruction. Indeed, if a member of the military does not at least have a role that contributes to its ability to pose threats, then what is the point of that role? If combatants were no more likely to contribute to threats than noncombatants, we would not have a functioning military.

However, soldiers' greater likelihood of contributing to threats does not justify premise (1) on its own. If civilians were more likely to be cul-

pable than soldiers, that might outweigh their different causal contributions. An agent's culpability for an unjustified threat depends on at least (a) whether she intended the threat, (b) whether she could foresee that she would contribute to it, and that it would be unjustified, and (c) whether she had reasonable alternatives to acting that way. However, if A's knowledge that *N* is a noncombatant, *C* a combatant, gives her *any* evidence pertaining to these facts, it suggests *C* is more likely to be culpable than *N*. Consider each in turn:

(a) *C*'s participation typically involves taking more steps to be part of the war as a whole. This suggests that it is closer to her intentions than for *N*.

(b) *C* could more easily foresee that her acts would lead to unjustified threats than could *N*, since the typical combatant contributes more than the typical noncombatant. Moreover, neither *C* nor *N* is more likely to know if those threats are justified. Combatants might sometimes have more first-hand information, but noncombatants have more time to inform themselves, and are less indoctrinated. If they are epistemic peers, and *C* is more likely to contribute causally, then *C* is taking a bigger risk than is *N*, which again means she is more likely to be acting culpably.

(c) It is hard to say in general whether combatants and noncombatants have reasonable alternatives to making their particular contributions. Conscripts might not, but any country that strictly penalizes conscientious objectors probably also penalizes its citizens for not doing their part. Volunteer combatants, of course, do have reasonable alternatives to fighting.

In summary: *C*'s combatant status is evidence that he is more likely to contribute to unjustified threats than *N*, and that he is perhaps more likely than *N* to be culpable for those contributions. Premise (1) follows: *N* is more likely to be innocent than *C*.

One might object that, if both *C* and *N* are on the justified side in a war, *A* might lack grounds to believe *C* sufficiently responsible for *unjustified threats*, even if he is more dangerous in general. This would be a mistake. Even if *C*'s side is in fact fighting justly, there is always a significant probability that any threats he contributes to are unjustified. Even the best wars involve numerous unjustified threats (including some war crimes), and in realistic cases, we are never certain that we are fighting a just war. As long as this is true, it remains more likely that *C* contributes to unjustified threats than that *N* does.

One might further object that premise (1) applies only to actual cases. We can imagine counterexamples: suppose the noncombatant population includes only adults in a direct democracy who have unanimously voted to launch an unjustified war, knowing their decision's ramifications, with no penalties for noncompliance; suppose their armed forces are noncitizen slaves who would be killed if they disobey orders.⁴³

43. For a similar case, see McMahan, *Killing in War*, 217.

Then premise (1) would be false. However, neither this premise, nor Moral Distinction, is an exceptionless statement of necessary truths. It suffices for my purposes if it is contingently true in the world as it is.

*C. Combatants Should Find out Whether Their Victims
Are Noncombatants*

Premise (1) would be irrelevant to Moral Distinction if *A* could not find out whether her potential victims are combatants or noncombatants. To address this possibility, I need to argue for:

- (2) Either *A*'s evidence bears on whether her potential victims are combatants or noncombatants, or she probably ought not to use lethal force at all.

The First Additional Protocol to the Geneva Conventions requires combatants to bear arms openly, wear uniforms, and separate themselves from the noncombatant population. It gives special legal privileges to those who fight openly, including the permission to use force and the rights of prisoners of war. In regular conflicts, when combatants fight according to international law, telling them from noncombatants should be easy.

However, Moral Distinction applies also in irregular conflicts, in which concealing soldiers among civilians can be necessary to military success. Of course, *A* can still tell whether her target is actually fighting, which is sufficient for combatant status. But it is a cliché about such conflicts that telling civilians and soldiers apart is very difficult.

For my argument to work, *A* need only believe that *N* is more likely than *C* to be a noncombatant (that is what I mean by *A*'s evidence bearing on whether her victims are combatants or noncombatants). If she does the morally required research, she will at least be able to reach this conclusion. If not, she typically should not fight at all.⁴⁴ The stakes could not be higher, so she must bear heavy costs to discover whom she is killing. If she still cannot find out whether her victims are combatants or noncombatants, then she lacks any evidence pertaining to liability, since from any other relevant evidence she could infer her victim's civilian/military status.

Killing someone when you have no idea whether she is liable or not is as seriously wrongful as killing someone whom you know to be innocent. If you are ready to proceed without knowing whether your target is liable, you display your indifference to her moral standing just as egregiously as if you knew for sure that she was innocent. For example, the indiscriminate 'harassment and interdiction' artillery campaigns used by the Russian army in the second Chechen War were as morally objectionable as the US attempt to bomb North Vietnam "back to the Stone Age" in

44. See article 57 of the First Additional Protocol, on Precautions in Attack.

the 1960s. Selecting targets at random is as bad as intentionally aiming at the innocent.⁴⁵ If *A* cannot find out whether her victims are combatants or noncombatants, she typically ought to withhold fire.

However, sometimes killing those you know to be innocent is permissible, either as an unintended side effect, or as an intended lesser evil. As presently stated, Risky Killing does not apply when: *A* lacks any evidence about *N*'s and *C*'s status; she has no beliefs on the matter; and she would be justified in killing them even if she knew they were innocent. I think these cases will be very rare, but they are nonetheless exceptions. However, a natural extension of Risky Killing would cover them.

The necessity and endangerment arguments from Sections III.C and III.D work with the victim's probabilities, as well as the agent's. If *A* subjects *N* to an unnecessary risk of harm, *on N's evidence*, then that aggravates *A*'s violation of *N*'s right to life; by exposing *N* to this unchosen risk of wrongful harm, *on N's evidence*, *A* further undermines her interest in security. Now, even if *A* does not know whether *N* or *C* is a noncombatant, *N* and *C* do know. And from their perspective, *N* is also more probably innocent than *C* is. Some of the arguments adduced in Sections IV.B and IV.D are equally relevant here. They will be both uncertain whether they have contributed to threats, and doubtful whether those threats are justified. With rare exceptions, *N* should be more confident that she is innocent than should *C*.

Combatants should find out whether their potential victims are civilians or soldiers. They should bear considerable costs to gather that information. If they have borne all reasonable costs and still have no relevant evidence, then they ought not to use lethal force unless the stakes are very high. Killing people without regard to whether they are innocent is as seriously wrongful as killing them knowing they are innocent. Cases in which *A* is ignorant about *N*'s and *C*'s status, but killing is nonetheless permissible, are exceptions to the present argument for Moral Distinction from Risky Killing, and I set them aside in what follows. Still, a modified version of Risky Killing could encompass them, since if both *N* and *C* are innocent, killing *N* is worse than killing *C* because *on their evidence*, *N* is more likely to be innocent than *C*.

D. Noncombatant Status Is the Best Evidence of Innocence

Premises (1) and (2) would not support Moral Distinction if *A* had further evidence, which showed that *C* was at least as likely to be innocent as *N*, contradicting premise (1). We need a further premise:

45. Jason Lyall, "Does Indiscriminate Violence Incite Insurgent Attacks? Evidence from Chechnya," *Journal of Conflict Resolution* 53 (2009): 331–62.

- (3) In all but rare exceptional cases, the rest of *A*'s evidence is consistent with the probability distribution in premise (1).

If merely being a taxpayer and voter in a democracy is sufficient for liability, for example, then premise (3) could be false, because *A* knows that *N* is an adult citizen of a democracy. Of course, some adult citizens do not pay taxes, or do not vote, or vote against the government that fought the war. And even if *N* is probably liable, it is still *more* likely that *C* is liable, since everything true of *N* is normally also true of *C* (as an adult, perhaps a voter, almost certainly a taxpayer), but combatants also contribute in other ways.

Nonetheless, endorsing this kind of *low threshold* of responsibility for liability clearly weakens Moral Distinction. I think this is good reason to reject the low threshold, which in general is far too permissive. In lethal self-defense, it is very likely that someone will die or suffer some other severe harm. Either Defender must kill Target or else bear the cost herself. There is a strong presumption against killing Target to save herself, for two reasons. Target has moral status, which prohibits sacrificing him for an equally good or marginally better outcome. And it is worse to kill another person than to let oneself die. Defender may kill Target only if there is a moral asymmetry between them that can overcome this presumption.⁴⁶ Only a high degree of responsibility delivers this asymmetry; only if the target is significantly responsible is there a proper fit between what he has done and the severity of his fate.

A high threshold might look like the following: some degree of causal contribution and some degree of agential involvement are necessary but not sufficient for liability to be killed; additionally, at least one of those elements must be relevantly *substantial*. A substantial causal contribution might mean being a necessary, sufficient, direct cause. Together with minimal agential involvement, that might suffice for liability to be killed. Substantial agential involvement might mean culpability, which with a relatively slight causal contribution might also suffice for liability.

On a high-threshold conception of liability like this, premise (3) will be true. In both regular and irregular warfare, very few noncombatants are sufficiently causally responsible for unjustified threats to be liable for that reason alone, and we normally cannot know how culpable they are. War is not the place to attribute guilt, which is difficult enough even in court. Attacking combatants typically target coordinates, not individuals; even when individuals are in their sights, they are almost invariably anonymous.⁴⁷ And they need not forbear from fighting if they cannot

46. This point was best made in McMahan, "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104 (1994): 252–90.

47. Some think that this uncertainty, and inability to discriminate, means that the innocent soldiers killed in war are not killed intentionally, at least not in the way required

determine their victims' guilt—the risk of killing innocent people must be traded against the importance of fighting justified wars. If we had to find out our targets' culpability before killing them, we would have to be pacifists.

Premise (3) holds true unless *A* discovers that *N* is causally responsible enough to be liable even if she is not culpable—perhaps she is a financier who has bankrolled the conflict, for example. Some other argument for Moral Distinction might still apply, but if not, this might be an exception. These exceptions will be rare, because so few noncombatants are causally responsible to the required degree.

What if the attacking combatant knows that his targets are politicians? Or munitions workers? Or other suppliers to the military? In both international law and our pretheoretical judgements, these are borderline cases. In my view, international law protects politicians because of their crucial role in establishing peace after conflict—not on principled grounds. People who are part of the command structure of the military are (morally) combatants.

Munitions workers and other suppliers are a harder case.⁴⁸ On the high threshold view, they do not causally contribute enough to unjustified threats to be liable unless they are also substantially culpable. Since we cannot know whether they are culpable, they are rightly considered noncombatants, and finding out that *N* is a munitions worker should not make her less likely to be innocent than *C*. To see this, consider a simple case. Albert runs the only gun store in town and sells Ben a weapon. Ben uses that gun to threaten Carrie's life. She can save herself only by killing Albert. I think doing so would be wrong, unless Albert was culpable for supplying Ben that weapon—either because selling guns in general is wrong or because selling to Ben was wrong. Munitions workers and other suppliers contribute less to unjustified threats than does Albert. And mere participation in weapons manufacture is not obviously wrong; otherwise how could we fight just wars? Since the circumstances of war make attributing culpability so difficult, we should think of munitions workers as noncombatants.

One might object like this: suppose *N* is a munitions worker; what if her side is clearly in the wrong, so that she must know that she will contribute only to unjustified threats? Wouldn't she be culpable enough then? In response: first, these general grounds for thinking *N* culpable will apply also to *C*, so the additional evidence will wash out, and *N* will still be more likely to be innocent than *C*. Second, even conflicts that

for killing them to breach a constraint (McMahan, "Who Is Morally Liable to Be Killed in War?" *Analysis* 71 [2011]: 544–59; Adil Ahmad Haque, "Killing in the Fog of War," *Southern California Law Review* 86 [2012]: 63–116). I do not take a position on that debate here.

48. Fabre, "Guns, Food, and Liability to Attack in War," *Ethics* 120 (2009): 36–63.

seem clear-cut with hindsight were, at the time, deeply contested, with radical evidential defects. Hypothetical cases can be misleading. The reality of warfare is always much messier than any case we can describe in a philosophy article, and there are always reasonable people with diametrically opposed interpretations of the facts.

One might further object that premise (3) is false in irregular conflicts: suppose *A* finds out that *N* has hidden enemy combatants in her house, for example. Should *A* then reject premise (1)? I think not. Evidence like this might narrow the gap between *N* and *C*, but still, *N* is more likely than *C* to be innocent. Although civilians contribute more to threats in irregular than in regular wars, *so do combatants*.⁴⁹ Over the last several decades, conventional militaries have been ‘civilianized’, so that many members of the armed forces have only an attenuated connection to combat.⁵⁰ Guerrilla forces do not enjoy the same specialist division of labour. The average guerrilla causally contributes more than the average combatant in regular armed forces. So, even if *N* is more likely to be liable in irregular conflicts, *so is C*, and premise (3) remains true.

Indeed, this point about civilianization of the military can be taken still further. If conventional militaries have clearly distinguished groups that contribute only insignificantly and marginally to unjustified threats, and are not distributed among the rest of the corps, so that on a high threshold they are surely innocent, then the argument from Risky Killing would suggest that killing them is no better than killing civilians. Perhaps one of the other arguments for Moral Distinction might step in, or perhaps we should consider them legitimate exceptions, like prisoners of war, or wounded combatants rendered *hors de combat*.

E. From Risky Killing to Moral Distinction

The next premise applies Risky Killing of Section III to the present case.

- (4) [From Risky Killing] If both *N* and *C* are innocent, then killing *N* is worse than killing *C* if either (i) *A* believes *N* more likely to be innocent than *C* or (ii) *A* believes *N* no more likely to be innocent than *C* because of *A*’s own negligence.

A’s negligence is either her failure to gather and respond adequately to the evidence or her decision to proceed, despite the evidence not supporting any conclusion as to her victims’ status. Negligent killing is

49. On this point, see Valentino, *Final Solutions: Mass Killing and Genocide in the Twentieth Century*, 196–233.

50. Gabriella Blum, “The Dispensable Lives of Soldiers,” *Journal of Legal Analysis* 2 (2010): 115–70.

worse when the negligence is more causally significant to the outcome. *N* has stronger grounds for complaint than *C*, because *A*'s doing the proper research would have given her more reason not to kill *N* but no less reason to kill *C*. Had she found out that *N* was a noncombatant, she would have had more reason to spare her; but finding out that *C* was a combatant would have the opposite result. *C* cannot complain, then, about *A*'s lack of research, whereas *N* has definitely been made worse off by it.

We can now make the implications of premises (1), (2), and (3) clear. Following premise (1), if *A* believes that *N* is a noncombatant and *C* a combatant, then *N* is more likely to be innocent than is *C*. Following premise (2), on *A*'s evidence either *N* is a noncombatant and *C* a combatant, or else *A* typically ought to refrain from using lethal force. Following premise (3), *A* has no further evidence pertaining to *N*'s and *C*'s liability that is more informative than their noncombatant and combatant status. So the probability assignment made in premise (1) stands up: on *A*'s evidence, *N* is more likely to be innocent than *C*. Taking these three together, if *A* kills *N* and *C*, there are four possible scenarios: (a) *A*'s evidence shows that the probability that *N* is innocent is greater than that *C* is, and *A*'s beliefs align with the evidence: she believes *N* more likely to be innocent than *C*; (b) *A*'s evidence shows that *N* is more likely to be innocent than *C*, but *A* believes *C* at least as likely to be innocent as *N* because she failed to do the proper research, or to reason adequately; (c) *A*'s evidence is inconclusive about *N*'s and *C*'s combatant or noncombatant status, and *A* ought not to use lethal force at all; (d) *A*'s evidence is inconclusive, but using lethal force would be permissible even if both *N* and *C* were noncombatants.

In scenario (a), killing *N* is worse than killing *C* according to the first disjunct of Risky Killing (premise 4(i)). In scenarios (b) and (c), *A* kills *N* and *C* negligently, by proceeding without doing adequate research, or proceeding when she should have held fire until doing more research became possible. Killing *N* is worse than killing *C* under the second disjunct of Risky Killing (premise 4(ii)). Scenario (d) is an exception to this argument but is picked up by the amendment suggested at the end of Section IV.C above. We can bring these points together into the following premise, and the main conclusion of the argument from Risky Killing:

- (5) [From premises (1), (2), and (3)] Either *A* believes *N* more likely to be innocent than *C*, or if she doesn't, then with rare exceptions that is because of *A*'s negligence.
- (6) [From premises (4) and (5)] If *N* and *C* are in fact innocent, then with rare exceptions, killing *N* is worse than killing *C*.

In other words, killing innocent noncombatants is worse than killing innocent combatants. Before proceeding from this preliminary con-

clusion to the justification of Moral Distinction, one might revive here the ‘moral beliefs’ objection to Risky Killing. Suppose *A* believes there is no such thing as rights or liability. Or that international law exhausts the moral rules applicable to war. Or she affirms a low threshold of liability to be killed. Each of these moral beliefs would affect the probability that she will kill a nonliable person. She might then reject premise (1) non-negligently, so premise (5) might be false.

Suppose that you were unpersuaded by my earlier response to this worry. Two more should help: first, given that the legal corollaries of Moral Distinction are so widely endorsed, I doubt whether *anyone* believes that enemy noncombatants are as likely to be liable as enemy combatants. Second, if *A* assigns no probability to high-threshold views of liability at all, then she is negligently overconfident in her moral beliefs. But if she assigns any probability to a high threshold, then premise (5) is true, since it is true on the high-threshold view and not contradicted by the alternatives. If liability is chimerical, then obviously *N* and *C* are equally unlikely to be liable. On a low threshold, *perhaps* *N* and *C* are equally likely to be liable, but more plausibly *C* is still more likely to be liable than *N*. Since *C* is more likely to be liable than *N* on the high-threshold view, however *A* splits her credence between these possibilities (no liability, high threshold, low threshold), the net result is that *C* is more likely to be liable than *N*.

We can now defend Moral Distinction. It will help to recall the premises so far:

- (1) If all that an attacking combatant *A* knows about two potential enemy victims *N* and *C* is that *N* is a noncombatant and *C* a combatant, then it is more likely that *N* is innocent than that *C* is.
- (2) Either *A*’s evidence bears on whether her potential victims are combatants or noncombatants, or she probably ought not to use lethal force at all.
- (3) In all but rare exceptional cases, the rest of *A*’s evidence is consistent with the probability distribution in premise (1).
- (4) [From Risky Killing] If both *N* and *C* are innocent, then killing *N* is worse than killing *C* if either (i) *A* believes *N* more likely to be innocent than *C* or (ii) *A* believes *N* no more likely to be innocent than *C* because of *A*’s own negligence.
- (5) [From premises (1), (2), and (3)] Either *A* believes *N* more likely to be innocent than *C*, or if she doesn’t, then with rare exceptions that is because of *A*’s negligence.
- (6) [From premises (4) and (5)] If *N* and *C* are in fact innocent, then with rare exceptions, killing *N* is worse than killing *C*.

This does not get us all the way to Moral Distinction, since it applies only when both *N* and *C* are innocent. The remaining steps require

us to lean again on a high threshold of responsibility for liability, on which very few noncombatants are liable to be killed:

- (7) With rare exceptions, noncombatants in war are innocent; so are many combatants.

By endorsing this high-threshold view, we can account not only for the comparative wrongfulness of killing civilians, relative to killing soldiers but also for its absolute, or noncomparative moral gravity. Killing civilians is so bad because they are almost invariably not liable to be killed. Of course, this means that some soldiers are also innocent. Risky Killing explains why killing innocent civilians is worse than killing innocent soldiers. But killing civilians is so seriously wrongful *because they are innocent*.

We can now argue for Moral Distinction disjunctively: killing noncombatants is worse than killing combatants either because the noncombatants are innocent and the combatants are not or, when both are innocent, because killing innocent noncombatants is worse than killing innocent combatants. This completes the argument for Moral Distinction:

- (8) [From premise (6)] With rare exceptions, killing innocent noncombatants is worse than killing innocent combatants.
 (9) Killing innocent noncombatants is worse than killing liable combatants (this is analytic: killing those who are liable to be killed is not wrongful).
 (10) [From premises (7), (8), and (9)] With rare exceptions, killing noncombatants is worse than killing combatants (i.e., Moral Distinction).

This argument justifies Moral Distinction on both the unjust and just sides in war. It is also consistent with some combatants and noncombatants being responsible to the same degree for contributing to unjustified threats (as per premise (7)). It rests on empirical claims that both Walzer and his revisionist critics should endorse, but it supports Moral Distinction when their views are silent. It does not cover every case in which Moral Distinction should apply, but it takes us closer to that goal.

V. CONCLUSION

Contemporary just war theory has made profound advances, setting the ethics of war on solid foundations. But there have been casualties along the way—no doubt unintended. Foremost among them is the moral distinction between killing soldiers and killing civilians. In this article, I have defended Moral Distinction, using normative and empirical premises that contemporary just war theorists can endorse. This is but one strand

in a pluralist defense of that principle. And Moral Distinction itself is only a first step toward the legal principles of noncombatant immunity, proportionality, and precautions in attack, on which the safety of civilians in war depends. But the case for those principles relies on Moral Distinction. Any successful argument in its favor bolsters the protection of civilians in war, when that protection is both most necessary and most at risk.